No. 207

In the Supreme Court of the United States

OCTOBER TERM, 1946

EMORY S. LAND, ETC., ET AL., PETITIONERS

v.

R. STANLEY DOLLAR, DOLLAR STEAMSHIP LINE, THE J. HAROLD DOLLAR ESTATES COMPANY, AND H. M. LORBER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONERS

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The District Court of the United States for the District of Columbia wrote no opinion. The opinion of the United States Court of Appeals for the Dis-

[1] Emory S. Land and Edward Macauley resigned from the Commission on January 15, 1946, and May 21, 1946, respectively. Howard L. Vickery died on March 21, 1946. These facts were suggested by a motion, filed with the Petition for Writ of Certiorari, to substitute W. W. Smith, present Chairman of the Commission, who took office on June 1, 1946, and Richard Parkhurst, who became a member of the Commission on February 20, 1946. Grenville Mellen took office on July 2, 1946, subsequent to the filing of the petition; this fact was suggested by a motion filed on July 17, 1946, to add Mr.

trict of Columbia (R. 162–170) is reported at 154 F. 2d 307.

JURISDICTION

The judgment of the Court of Appeals was entered on March 18, 1946 (R. 171–172). The petition for a writ of certiorari was filed on June 17, 1946, and granted on October 14, 1946 (R. 174). The jurisdiction of this Court rests upon the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the accepted procedure under Section 37 of the Judicial Code, which allows a district court to search the entire record for jurisdictional facts when its jurisdiction is questioned, is inapplicable to a proceeding where the jurisdictional doubt rests on the circumstance that the suit may be one against the United States, so that the district court must retain jurisdiction and proceed to a trial on the merits solely by virtue of allegations that the defendants are in unlawful possession of property under a void claim of title by the United States, where, at a hearing on motion for a preliminary injunction, uncontroverted evidence ad-

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Mellen. The term of John M. Carmody expired on September 26, 1946. One vacancy exists in the membership of the Commission at this time.

This Court, in granting certiorari, permitted the addition as petitioners of the new members of the Commission, but deferred action on the motion to dismiss those petitioners who are no longer with the Commission (R. 174).

duced by the defendants established the title of the United States.

2. Whether a suit brought against Government officers to obtain possession of stock held by such officers under a claim of absolute ownership by the United States with documentary legal title in the United States, on the ground that such stock had been pledged to secure an indebtedness now satisfied, is a suit against the United States.

3. Whether the United States Maritime Commission, an agency of the United States, is subject to suit.

STATUTES INVOLVED

Section 37 of the Judicial Code, 28 U. S. C. 80, provides in part:

> If in any suit commenced in a district court * * * it shall appear to the satisfaction of the said district court, at any time after such suit has been brought * * *, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, * * * the said district court shall proceed no further therein, but shall dismiss the suit * * * and shall make such order as to costs as shall be just.

Section 101 of the Merchant Marine Act, 1936, 49 Stat. 1985, 46 U. S. C. 1101, provides in part:

> It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry

its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service on all routes essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, * * *. It is hereby declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine.

Section 201 (a) of the Merchant Marine Act, 1936, 49 Stat. 1985, 46 U. S. C. 1111, provides in part:

> An agency is hereby created, to be known as the United States Maritime Commission (hereinafter referred to as the Commission). The Commission shall be composed of five persons, in this title referred to as members, to be appointed by the President by and with the advice and consent of the Senate. The President shall designate the member to act as chairman of the Commission, and the Commission may elect one of its members as vice chairman. * * * Vacancies in the Commission, so long as there shall be three members in office, shall not impair the power of the Commission to execute its functions, and three of the members in office shall constitute a quorum for the transaction of the business of the Commission. * * *

Section 207 of the Merchant Marine Act, 1936, 49 Stat. 1988, as amended by Section 2 of the Act of

June 23, 1938, 52 Stat. 954, 46 U. S. C. 1117, provides in part:

> The Commission may enter into such contracts, upon behalf of the United States, and may make such disbursements as may, in its discretion, be necessary to carry on the activities authorized by this Act, or to protect, preserve, or improve the collateral held by the Commission to secure indebtedness, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter. * * *

STATEMENT

In April 1937, Dollar Steamship Lines, Inc., Ltd. ("Dollar of Delaware") owed the United States more than $15,000,000 on ship sales notes, construction loans, and other obligations, on which $3,000,000 had long been in default (R. 23). The company also was indebted to private creditors in an amount exceeding $2,000,000, and was without sufficient net income or current assets to meet amortization requirements (R. 23). Defaults on both Government and private obligations were increasing steadily (R. 23). Vessel maintenance had been neglected and sailings were made only with the greatest difficulty (R. 23).

In early 1937, both the Government and the company had under consideration bankruptcy proceedings (R. 23); such proceedings would have seriously interrupted and impaired the service operated by Dollar of Delaware, the only American-flag shipping service from the Pacific Coast to the Far East,

which the Maritime Commission had found to be essential to the commercial and military welfare of the United States; they would also have resulted in serious losses to trade creditors and considerable unemployment (R. 22, 23–24, 27).[2] Nor could the Commission buttress Dollar of Delaware's position by an operating subsidy because it could not make the required statutory finding that the company possessed financial resources necessary to conduct the shipping operations involved (R. 24).[3] On the contrary, in the Commission's judgment, Dollar of Delaware was on the brink of bankruptcy, and was being operated inefficiently and in a manner detrimental to the interest of the United States (R. 22).

In an effort to preserve this essential steamship service, a partial rehabilitation of the company, including adjustment and capitalization of trade, bank, and intercompany debt, and a reconstitution of the board of directors, was consummated on January 25, 1938 (R. 24).[4] However, Dollar of

[2] It was estimated that bankruptcy of the company would have resulted in an annual loss of purchasing power on the West Coast of approximately $10,000,000 (R. 26).

[3] Even if an operating subsidy had been granted, the default of Dollar of Delaware on obligations due the United States would have compelled the withholding of subsidy payments by the Commission (R. 24).

[4] A detailed report of this partial rehabilitation, entitled "Financial Readjustments in Dollar Steamship Lines, Inc., Ltd." (Exhibit "A–1" to the affidavit of Emory S. Land), was made to Congress by the Maritime Commission on February 17, 1938 (R. 22). By stipulation, this printed report has not been reprinted, but is on file with the Clerk of this Court as part of the record (R. 172–173).

Delaware's financial position continued to deteriorate, and, by March 1938, a complete cessation of its service was imminent (R. 25).

On April 28, 1938, the Commission advised respondent Dollar that it would arrange a five-year operating subsidy if the existing indebtedness of Dollar of Delaware to the Government could be guaranteed, the guarantees to be secured by a pledge of all of the stock—preferred as well as common—of Dollar of Delaware, held by Robert Dollar Company and respondents Dollar and Dollar of California (R. 25). This proposal was rejected (R. 25). Thereafter, it was suggested that the Dollar interests (respondents herein) would agree to transfer to the Commission title to the common stock held by them (R. 25–26). The Commission accordingly authorized negotiations for the acquisition of this stock, the negotiations culminating in the contract of August 15, 1938, with respondents (and certain other stockholders) (R. 26–27, 8–18).

Briefly, the contract provided for the transfer by respondents of their common stock in Dollar of Delaware (R. 9–11). In return, respondents Dollar of California and R. Stanley Dollar were released from their liability as co-obligors on Dollar of Delaware's obligation to the United States (R. 13–14).[3]

[3] The release of Dollar of California substantially benefited all respondents—as did certain mutual releases effected by the contract—by reason of stock ownership in Dollar of California and related companies. See Chart immediately preceding page 1 of Exhibit A–1 to the affidavit of Emory S. Land.

Respondents R. Stanley Dollar and Lorber were also released from their obligation to Dollar of Delaware and were to be indemnified by the latter with respect to their obligations to third parties (R. 13–14). The agreement contemplated a five-year operating subsidy to Dollar of Delaware, a loan of $1,500,000 from the Commission to the company for vessel repair and reconditioning, and a working capital loan of $2,000,000 from the Reconstruction Finance Corporation (R. 15).[6]

The transaction was completed prior to the close of 1938 (R. 27–28, 29). Respondents endorsed their common stock in blank and, with transfer tax stamps affixed, it was delivered to the Maritime Commission on October 26, 1938, through an escrow agent (R. 27–28).[7] Following the agreement of August 15, 1938, the name of Dollar of Delaware was changed to American President Lines, Ltd. (R. 29). By September 6, 1943, American President Lines, Ltd., had fully satisfied all indebtedness

[6] The Commission eventually made a loan of $2,000,000 to the company and the Reconstruction Finance Corporation loaned $2,500,000. See report of the Commission to Congress entitled "Reorganization of American President Lines, Ltd." (formerly Dollar Steamship Lines, Ltd.), pp. 280–283. This report is Exhibit A–2 to the affidavit of Emory S. Land. Pursuant to stipulation, this printed report has not been reprinted, but is on file with the Clerk of this Court as part of the record (R. 172–173).

[7] Congress was advised, on April 10, 1939, of this entire transaction, including the legal and factual justification for the outright acquisition of the Dollar of Delaware stock (Exhibit A–2 to the affidavit of Emory S. Land).

due the United States from its earnings realized subsequent to October 26, 1938 (R. 29–30).

a. *The complaint.*—The instant proceeding was instituted by respondents on November 6, 1945, in the District Court for the District of Columbia (R. 1). The complaint, referring to the inability of Dollar of Delaware to obtain an operating subsidy and to that company's indebtedness to the United States (R. 3, 4, 6), alleged that the company had been faced with the alternative of executing the contract and surrendering the stock—requirements imposed by the Maritime Commission as a condition to the granting of a subsidy—or of becoming unable to meet its obligations as they accrued, and that the company was thus involuntarily forced to enter into the contract (R. 4–5). A copy of the contract was attached to the complaint (R. 5, 8–18). After characterizing the transfer of stock of respondents to the United States under the contract as "in fact and in legal effect" collateral security for the indebtedness of Dollar of Delaware to the United States (R. 6), the complaint alleged possession of the stock by petitioners under a claim of absolute ownership by the United States (R. 6), and prayed that the then members of the Maritime Commission be enjoined from selling the stock and that they be directed to turn it over to respondents (R. 7–8).[5]

[5] On or about July 6, 1943, the Maritime Commission publicly offered the stock here involved for sale (R. 30). Propo-

b. *Proceedings in the district court.*—A temporary restraining order was issued against petitioners, and a hearing on respondents' prayer for preliminary injunction was held on November 15, 1945 (R. 82). In affidavits opposing the prayer for an injunction, petitioners showed the facts set forth *supra*, pp. 5–9, and, addition, that they had no personal interest in the subject matter of the suit (R. 22); that the stock in issue had been listed as an asset by the Commission in annual reports to Congress (R. 102–103); that respondents' counsel, in closing the contract of August 1938, had advised the Commission that valid title to the stock, free and clear, would be conveyed (R. 27–28; 38–41); that counsel for respondent Estate of Dollar, to convey its stock in accordance with the contract, had petitioned a California court for, and obtained, an order authorizing the sale of the stock (R. 28; 42–48); and that respondents Dollar, Lorber, and Dollar of California had, in 1938, reported the stock transaction here in issue as an absolute transfer for federal income tax purposes, taking credit for losses (R. 55–57, 63, 69, 78).

At the November 15 hearing, petitioners suggested lack of jurisdiction to the district judge on the ground that the suit was one against the United

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sals received were considered and rejected on October 19, 1943 (R. 30). At the time of the institution of this suit, the Commission had under consideration substantial offers to purchase the stock (R. 30), but has, of course, taken no action with regard to such offers.

States without its consent (R. 97–98). The district judge thereafter ordered a second hearing on the question of jurisdiction which was held on December 20, 1945 (R. 111, 115). Respondents offered no evidence at either hearing. Admitting that the stock in question had been lawfully acquired and held by the United States until American President Lines had discharged its obligations to the Government in November 1943, respondents stated that their cause of action was for the return of pledged stock upon the satisfaction by the company of the underlying obligation (R. 123, 137, 143, 146–147). At the close of their argument, respondents stated that there was "no real dispute upon the facts" and urged that "a final decree, instead of an interlocutory injunction, may be rendered at this time" (R. 148).

The district judge dismissed the complaint on his own motion, stating: "I think two things. One is that this transaction was legal, in the sense that the Commission had the legal right; and therefore I think it is inescapable that this is a suit against the United States" (R. 152). An order was entered on December 21, 1945, denying the motion for a preliminary injunction and dismissing the complaint on the court's own motion (R. 79).

c. *Proceedings in the Court of Appeals.*—The court below reversed the judgment of the district court and remanded the case for further proceedings not inconsistent with its opinion (R. 171–172).

It held that, since petitioners had not answered or moved for summary judgment, the "proceedings below went only to the motion for a preliminary injunction" (R. 163). Accordingly, the court below stated that it must treat the case has having gone off on a motion to dismiss and, invoking a rule against speaking demurrers, refused to consider the evidence submitted by petitioners and limited itself to an examination of the allegations of the complaint (R. 164, 170).[9]

Adopting the pledge theory of respondents' cause of action, the court below held that the complaint stated a claim upon which relief could be granted, subject to the question of jurisdiction over suits against the United States (R. 164–166). As to the jurisdictional problem, it stated that, in a suit against a government officer which involved the question of suit against the United States, the preliminary decision for jurisdictional purposes is identical with the ultimate question in the suit and

[9] The court below recognized that "most, if not all, of the substantive elements necessary to a decision on the merits" (R. 163) had been adduced by the parties in the district court. As noted above, both parties had finally agreed, in the hearings before the district judge, that no material issues of fact were presented (R. 112, 148). Consequently, further proceedings in the district court would necessarily consist of a formal trial to establish facts already of record. But the court below, after limiting its review to the allegations of the complaint, referred to the "complex and important substantive issues involved" (R. 164), and "controversial questions of * * * fact proper for presentation to a trial court" (R. 170).

accordingly, assertions in the complaint of want of power in the officers are to be accepted at face value (R. 167–168). In applying that test, the court discussed the nature of the Maritime Commission and found that Congress had intended it to be a suable entity, a conclusion which was felt to support its view that the present suit was one within the jurisdiction of the district court (R. 168–170).

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals for the District of Columbia erred:

1. In failing to hold that this suit is one against the United States to which the United States has not consented.

2. In holding that the United States Maritime Commission is a suable entity.

3. In holding that the district court has jurisdiction of this suit.

4. In holding that the affidavits filed by petitioners could not be considered in determining the essential nature of this suit.

5. In holding that the district court was bound by the allegations of the complaint in determining whether it had jurisdiction to entertain the suit.

6. In reversing the judgment of the district court dismissing the complaint in this action.

SUMMARY OF ARGUMENT

I

The court below refused to consider the information contained in petitioners' affidavits filed in op-

position to respondents' motion for a preliminary injunction and implictly held that the district court should also have rejected these affidavits. But the basis of this position—that the affidavits raised controversial factual questions—does not reflect the true situation since, in the district court, both parties admitted that there was no genuine issue of material fact involved.

Moreover, the district court could properly consider the affidavits. The lack of jurisdiction suggested by petitioners was an obstacle not only to the granting of a preliminary injunction but to the maintenance of the proceeding in its entirety—a situation falling within the express language and purpose of Section 37 of the Judicial Code. A district court resolving jurisdictional doubt under that Section has discretion to inquire into the facts as they really exist and, in so inquiring, frequently considers affidavits. *Morris* v. *Gilmer*, 129 U. S. 315; *Wetmore* v. *Rymer*, 169 U. S. 115. The propriety of considering the affidavits in these circumstances is supported by the well-established practice of the filing of affidavits in support of a motion to dismiss or for summary judgment based on jurisdictional grounds. Since Section 37 permits a district court to consider jurisdictional questions in the absence of formal motion of the parties, but leaves unchanged the substantive basis for action, the district court's power to inquire into a jurisdictional question on its own motion is at least as

broad as, if not broader than, its power to act on such question upon the motion of one of the parties. The sole difference between these two situations is the source of the motion, but that should be without legal consequence, since that difference could not and does not harm respondents in any way. Under both procedures, the court is required to give respondents notice and opportunity to be heard and present evidence on the jurisdictional question. These requirements were satisfied in the present case.

II

Respondents' theory in suing petitioners as private individuals is that the original transfer of the stock under the 1938 contract was as security for a debt and that since the debt is now extinguished, petitioners' refusal to return the stock was wrongful. Under the contract, however, possession of, and title to, the stock here involved was validly transferred to the United States, which possession and title the United States still has and claims. We point out that, because of these facts, this proceeding clearly is a suit against the United States whether the complaint is taken together with the affidavits or alone. We do not attempt to reconcile the cases in this field, for we believe that the lines of authority culminating in the recent *Mine Safety Appliances Co.* v. *Forrestal*, 326 U. S. 371, govern the present situation, and that *United States* v. *Lee*,

106 U. S. 196, relied on by respondents, is inapplicable. The discussion of that question also demonstrates that the lack of jurisdiction is clear without looking to the merits, contrary to the holding of the court below.

A. When the complaint is viewed together with the affidavits, it is apparent that the United States is the real party in interest and that this suit is not maintainable without its consent. Petitioners have no individual interest in the stock and claim no individual title or right to possession to the stock. The United States has, and claims the right to retain, possession and title to the stock, and the entire impact of the decree would be solely, and directly, upon that possession and title.

B. When the complaint is read alone, it appears that respondents seek an order enjoining petitioners from selling the stock and directing them to return it to respondent. That such relief could not be secured against petitioners as private individuals is conclusively shown, and, therefore, this relief cannot be secured against the four petitioners who no longer are members of the Maritime Commission. On the other hand, since the United States lawfully acquired possession of and title to, the stock, and since the return of the stock is allegedly due respondents by virtue of the contract, the proceeding is in effect a suit for specific performance of a contract with the United States. It is no different from an attempt to reach money in the hands

of the Government, which likewise is barred by sovereign immunity.

C. *United States* v. *Lee*, 106 U. S. 196, relied on by respondents, is inapplicable. In that case, the original taking was a trespass whereas here no trespass occurred either at the original taking or any time thereafter. In addition, the action in the *Lee* case was ejectment, which put in issue only the right to possession, and not the title to the land claimed by the United States. This limitation in the *Lee* case, recognized in that and subsequent cases, makes it clear that that case does not govern situations, such as the present one, which involve the rights of the United States to retain title to property.

D. The statement of the court below that the Maritime Commission is suable, if intended to support the conclusion that the suit was against individuals, is irrelevant, since, in the absence of an attempt to sue the Maritime Commission, it is immaterial whether the Commission is suable. As an independent basis of jurisdiction, the statement assumes that the suit is against the Maritime Commission, contrary to respondents' position. In any case, there is no express waiver of immunity generally in the Merchant Marine Act of 1936, as amended, or in Section 207 of that Act which the court below relies on, and to imply such a waiver disregards a long line of decisions forbidding such implication.

ARGUMENT

I

THE DISTRICT COURT PROPERLY CONSIDERED THE UNCONTROVERTED FACTS CONTAINED IN PETITIONERS' AFFIDAVITS FILED IN OPPOSITION TO RESPONDENTS' MOTION FOR A PRELIMINARY INJUNCTION

Respondents, in their complaint, requested a preliminary injunction as well as a permanent injunction and an order directing the petitioners to deliver the stock to respondents (R. 7–8). Two hearings were held on the motion for a preliminary injunction, the first on November 15, 1945, the second on December 20, 1945 (R. 82, 115). At the outset, petitioners did not formally move to dismiss or for summary judgment, but instead opposed in open court the granting of a preliminary injunction on the ground, *inter alia*, that since the proceeding was an effort "to divest the United States of property, which it possesses and to which it asserts title" (R. 97) it was a suit against the United States, to which it had not consented and that the court was without jurisdiction in the premises. In support of their position, petitioners submitted to the court the affidavits here involved. Argument thereafter was addressed principally to the jurisdictional question thus suggested to the court.

At the close of the first hearing, the district court informed respondents that it would like to hear from them on the question "whether this Court has jurisdiction, which I must say at this moment I

doubt very much, because it does seem to me an action which would divest the government of property, and therefore a suit against the United States" (R. 111). Respondents agreed to submit a brief on that question and at the second hearing on December 20, more than a month later, new counsel was introduced as desiring "to argue the question of jurisdiction for the plaintiffs" (R. 115).

At no time in the course of the two hearings before the district court or the Court of Appeals did respondents challenge the truth of the information contained in petitioners' affidavits.[10] On the contrary, respondents expressed the opinion before the district court that there was no "real dispute upon the facts," and that the proceeding raised "really a question of law" (R. 148); they further suggested that the parties agree "that this hearing may be deemed a hearing upon the merits of the case, and that a final decree, instead of an interlocutory injunction, may be rendered at this time" (R. 148).[11] In these circumstances, the respondents' reliance (Br. in Opp., pp. 3–4, 17) on *Polk Company* v. *Glover*, 305 U. S. 5, 8, and *Gibbs* v. *Buck*, 307 U. S. 66, 76, is misplaced. In those cases, the Court held that affidavits which are part of the record only for the purpose of determining the propriety of the temporary injunction may not be considered in passing

[10] Nor was the propriety of considering the affidavits questioned by respondents at any time in the district court.

[11] Counsel for petitioners had earlier suggested that there was no genuine issue of material fact (R. 112).

on a motion to dismiss for failure to state a cause of action. But the affidavits filed in this case were conceded to be of broader significance. Here the respondents did "submit the case to be decided upon the merits upon the bill * * * and affidavits." *Polk Company* v. *Glover*, 305 U. S. at 9. See also *infra*, note 13, p. 25.

Although the Court of Appeals stated that it recognized that the parties, "during the course of their argument * * * may have placed before the lower court most, if not all, of the substantive elements necessary to a decision on the merits" (R. 163), and that respondents regarded the proceeding as presenting no factual issue and as pointing toward a final determination on the merits (R. 164), it refused to consider the affidavits in determining the jurisdictional question. Instead it confined itself to the complaint alone, since, in its opinion, the affidavits "raise controversial questions of law and fact proper for presentation to a trial court" (R. 170) and hence to consider the affidavits would "infringe upon the lower court's prerogative to decide the case on the merits" (R. 170).

In the light of what transpired in the district court, we hardly need labor the misconception of the court below, nor attempt to answer the argument presently made by respondents (Br. in Opp., pp. 18–19) that there are questions of fact, preliminary to a decision on the jurisdictional question, which require resolution by a trial court, since as

we have already pointed out, (*supra*, p. 19), respondents admitted that there was no dispute on the facts. We therefore discuss the refusal of the court below, and its implicit denial of a right in the district court, to consider the undisputed factual information contained in the affidavits in determining whether the proceeding was in effect a suit against the United States, and point out that under Section 37 of the Judicial Code, the district court properly could consider such affidavits in determining its jurisdiction.

A. *Under the authority to raise jurisdictional questions sua sponte, vested in a district court by Section 37 of the Judicial Code, the court may consider any evidence, including affidavits then in the record.*—In the present case, when petitioners opposed the motion for a preliminary injunction on the ground that the proceeding was a suit against the United States to which it had not consented, such opposition was, of course, not limited solely to the granting of the injunction but included the entire proceedings then pending in the district court, since the basis of the opposition, if valid, is incapable of remedy by amendment, and therefore would require not only a denial of the injunction but a dismissal of the complaint as well (R. 97). *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 52–53; *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269; *United States* v. *Corrick*, 298 U. S. 435, 440; *Morris* v. *Gilmer*, 129 U. S. 315, 325; cf. *Meccano, Ltd.* v.

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John Wanamaker, 253 U. S. 136, 141; *United States Fidelity & Guaranty Co.* v. *Bray*, 225 U. S. 205, 214; *Smith* v. *Vulcan Iron Works*, 165 U. S. 518, 525. Because of the fundamental nature of the question thus raised, once a district court has been put on notice that its jurisdiction is in doubt, the court is explicitly charged with the duty of determining whether it has jurisdiction, regardless of the stage of the proceeding. Unless the existence of jurisdiction is shown to its satisfaction, the district court is barred from proceeding any "further therein but shall dismiss the suit or remand it to the court from which it was removed." Section 37 of the Judicial Code;[12] see *Morris* v. *Gilmer*, 129 U. S. 315; *Wetmore* v. *Rymer*, 169 U. S. 115; *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178; *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269; cf. *United States* v. *Corrick*, 298 U. S. 435, 440, and cases there cited. This duty imposed on the district court has also been recognized in Rule 12 (h) of the Federal Rules of Civil Procedure dealing with "Waiver of Defenses" which provides in part "(2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the

[12] Section 37 of the Judicial Code was enacted into law as Section 5 of the Act of March 3, 1875, 18 Stat. 470, 472. For its subsequent transformation into Section 37, see *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283, 287–288. Prior to 1875, questions concerning the jurisdiction of the court could be raised only by a plea in abatement in the nature of a plea to the jurisdiction. See *Farmington* v. *Pillsbury*, 114 U. S. 138, and cases there cited.

subject matter, the court shall dismiss the action." See *Notes of Advisory Committee on Federal Rules of Civil Procedure*, Note to Subdivision (h) of Rule 12.

In resolving the jurisdictional doubt, the district court was "not bound by the pleadings of the parties but [could], of its own motion, if led to believe that its jurisdiction is not properly invoked, 'inquire into the facts as they really exist.'" *McNutt* v. *General Motors Acceptance Corp.*, *supra*, 184, 189; *Wetmore* v. *Rymer*, 169 U. S. 115, 120; *Anderson* v. *Watt*, 138 U. S. 694; *Steigleder* v. *McQuesten*, 198 U. S. 141, 143. Such inquiry may be conducted in such manner as the court sees fit, since "it would appear to have been the intention of Congress to leave the mode of raising and trying such issues to the discretion of the trial judge." *Wetmore* v. *Rymer*, *supra*, at 121; *McNutt* v. *General Motor Acceptance Corp.*, *supra*; *Gilbert* v. *David*, 235 U. S. 561, 568; *Anderson* v. *Watt*, 138 U. S. 694. The conduct of such inquiry by affidavits, as in the instant case, has long been accepted (*Morris* v. *Gilmer*, 129 U. S. 315; *Wetmore* v. *Rymer*, *supra*; *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269) and has been utilized not only in the district court but in this Court as well to resolve jurisdictional questions. *Roura* v. *Philippine Islands*, 218 U. S. 386; *Williamson* v. *Kincaid*, 4 *Dall.* 20; *Rush* v. *Parker*, 5 Cranch 287; cf. *Clark* v. *Paul Gray, Inc.*, 306 U. S. 588.

Although most of the authorities permitting the use of affidavits in jurisdictional inquiries under Section 37 involve either questions of jurisdictional amount or diversity of citizenship, that fact alone does not, we submit, make them inapplicable. There is nothing in the Section itself nor has anything been suggested by respondents which would support any such limitation on its application. On the other hand, no court has jurisdiction in suits against the United States to which it has not consented, and, hence, an attempt to maintain such a proceeding clearly falls with the express language of Section 37, which extends to suits which do "not really and substantially involve a dispute or controversy properly within the jurisdiction of such district court." In addition, the absence of jurisdiction in such a proceeding is not remediable and one of the manifest purposes of Section 37 is to enable the district court, in the interest of efficient judicial administration, to dismiss fatally defective bills on its own motion, and thus avoid needless litigation, delay, and expense. Accordingly, we submit that jurisdictional questions arising out of a claim to sovereign immunity are within the scope of Section 37, and that the accepted procedures under that Section are applicable.

B. *A district court's power under Section 37 is no less than its power on motion to dismiss or for summary judgment where the information contained in such affidavits may properly be consid-*

cred.—The practice in disposing of jurisdictional questions raised on motion of one of the parties reinforces this conclusion. If instead of informally suggesting to the district court its lack of jurisdiction, petitioners had formally filed a motion to dismiss or for summary judgment, there would be no question as to the propriety of the district court's consideration of affidavits. Rule 56 of the Federal Rules of Civil Procedure expressly provides for the filing of affidavits in support of the motion for summary judgment, and although Rule 12 (b) does not expressly so permit, the Court of Appeals for the District of Columbia as well as the majority of the circuit courts of appeals have approved the filing of affidavits in support of a motion to dismiss pursuant to Rule 12 (b) (1) through (5) [13] on the

[13] Unlike the virtually unanimous approval of affidavits supporting motions to dismiss based on the grounds set forth in Rule 12 (b) (1) through (5), which includes jurisdictional objections, there appears to be considerable doubt as to the propriety of considering affidavits on a motion to dismiss for failure to state a cause of action (Rule 12 (b) (6)). 1 Moore, *Federal Practice*, pp. 646–647, and cases cited in 1945 Supplement. It is this latter ground which is involved in that part of this Court's opinion in *Gibbs* v. *Buck*, 307 U. S. 66, 76–77, and *Polk Company* v. *Glover*, 305 U. S. 5, 9, on which respondents have relied as support for the proposition that the district court could not consider the affidavits in determining its jurisdiction on a motion for preliminary injunction (Br. in Opp., pp. 3–4, 17). But that ground is not involved in the instant case. On the other hand, in *Gibbs* v. *Buck*, the motion to dismiss opposing the motion for preliminary injunction was also based on the absence of the requisite jurisdictional amount; in determining that question, this

ground that it is not important whether the objection is called a motion to dismiss or one for summary judgment. Since the same relief is sought, the difference in name is unimportant. In any event the affidavits presented are available on either motion." *Central Mexico Light & Power Co.* v. *Munch*, 116 F. 2d 85, 87 (C. C. A. 2); *National War Labor Board* v. *Montgomery Ward & Co., Inc.*, 144 F. 2d 528 (App. D. C.); *Gallup* v. *Caldwell*, 120 F. 2d 90 (C. C. A. 3); *Victory* v. *Manning*, 128 F. 2d 415 (C. C. A. 3); *Lucking* v. *Delano*, 129 F. 2d 283 (C. C. A. 6); *Carroll* v. *Morrison Hotel Corp.*, 149 F. 2d 405 (C. C. A. 7); *Davis* v. *Schackleford*, 91 F. 2d 148 (C. C. A. 8).

Since affidavits may properly be considered in determining a jurisdictional doubt raised on motion of one of the parties, such affidavit should likewise be available when the same jurisdictional doubt is suggested by one of the parties and the court acts on its own motion as it is authorized and required

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Court considered statements outside the complaint as a matter of course and, citing *Wetmore* v. *Rymer*, *McNutt* v. *General Motors Acceptance Corp.*, and *KVOS* v. *Associated Press*, relied on by petitioners, *supra*, pp. 22, 23, stated "As there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court" (307 U. S. at 71-72). Such language is commonly used in regard to Section 37 and its use here lends additional support to petitioners' position that the two procedures above discussed are basically the same. In passing, it may be noted that respondents' reliance on cases where affidavits were filed to support a motion to dismiss filed by one of the parties appears inconsistent with their theory that such cases are here inapplicable (Br. in Opp., pp. 17, 19).

to do under Section 37. Prior to the enactment of Section 37, such jurisdictional questions could be raised only on a plea filed by one of the parties, and Section 37 "altered the practice by requiring the court to dismiss or remand on its own motion in a proper case although want of jurisdiction was not raised by appropriate motion or by plea or answer, but did not change the substantial basis for the court's action." *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283, 287–288. The district court's power to inquire into its jurisdiction on its own motion would, therefore, seem to have at least the same scope as its power to act on the motion of one of the parties. *Central Mexico Light & Power Co.* v. *Munch*, 116 F. 2d 87 (C. C. A. 2); *Hackner* v. *Guaranty Trust Co. of New York*, 117 F. 2d 95 (C. C. A. 2); cf. *Gibbs* v. *Buck*, 307 U. S. 66, 72; *Davis* v. *Schackleford*, 91 F. 2d 148, 150 (C. C. A. 8). As a matter of fact, since as has been pointed out, *supra*, p. 23, the mode of trying such issues under Section 37 has been left to the discretion of the court, the scope of the district court's power to conduct such an inquiry on its own motion under Section 37 might well be broader than when the issue is raised on motion of one of the parties.

The only difference between the situation where the court acts upon the motion of one of the parties and where it acts upon a party's suggestion and its own motion is one which should be without legal consequence. In the latter situation there is no

formal motion by one of the parties to dismiss or for summary judgment; it is the court's own motion which is being acted upon. But that difference could not, and did not, harm respondents in any way, for, regardless of the movant, the requirements of notice and opportunity to be heard and present evidence under both procedures are the same.[14] Valid action under Section 37 as upon a motion to dismiss or for summary judgment (Rule 56 (c) of F. R. Civ. P.), cannot be taken without giving the parties to be affected by the dismissal "reasonable notice and an opportunity to produce evidence and to be heard upon the question of the verity of the jurisdictional fact." *Davis* v. *Schackleford*, 91 F. 2d 148, 150 (C. C. A. 8); *Hartog* v. *Memory*, 116 U. S. 588, 591; *Wetmore* v. *Rymer, supra; Morris* v. *Gilmer, supra; Huntington* v. *Laidley*, 176 U. S. 668, 678. And in the present proceeding, these requirements have been met; petitioners' opposition to the issuance of the preliminary injunction on jurisdictional grounds at the outset of the first hearing and the district court's request addressed to respondents for a memorandum of points and authorities on the jurisdictional question at the close thereof (*supra,*

[14] Respondents have suggested that because of the absence of a motion to dismiss, they were deprived of an opportunity to amend their complaint (Br. in Opp., p. 4). This suggestion is not consistent with the facts; at the hearings before the district court, respondents requested, and were granted, permission to correct formal inaccuracies (R. 116), but these corrections were not in fact made.

pp. 18–19) fully "apprised" respondents that their complaint might be dismissed on jurisdictional grounds. In addition, at the second hearing more than a month later, a new counsel was introduced specifically for the purpose of arguing the jurisdictional issue and his subsequent two-hour argument devoted primarily to that question not only indicated beyond any doubt respondents' awareness of that possibility but showed further that respondents were being accorded an opportunity to be heard.

Since the Rules of Civil Procedure are to be "construed to secure the just, speedy, and inexpensive determination of every action" (Rule 1 of F. R. Civ. P.), the failure of petitioners formally to move to dismiss or for summary judgment should not be thought to require a different result, particularly since respondents were not injured by such omission. We submit, therefore, that inasmuch as affidavits may properly be considered in proceedings under Rule 12 (b) (1) through (5), such affidavits are also proper in Section 37 proceedings.

II

THE DISTRICT COURT PROPERLY DISMISSED THE COMPLAINT FOR LACK OF JURISDICTION SINCE THIS IS A SUIT AGAINST THE UNITED STATES, TO WHICH IT HAS NOT CONSENTED

The facts pertinent to the jurisdictional issue are as follows: On August 15, 1938, respondents entered into a contract with the Maritime Commission, providing for a transfer of the stock involved to the

Commission. The contract contained no limitation on the transfer. (R. 8–18.) In accordance with the provisions of the contract, respondents endorsed the stock in blank and, with stock transfer stamps affixed, caused them to be delivered to the Commission (R. 27–28), thereby delivering possession and documentary legal title to the Commission. *Radio Electronic Television Corp.* v. *Bartniew Distributing Corp.*, 32 F. Supp. 431 (S. D. N. Y.); Uniform Stock Transfer Law, Sec. 1; Calif. Civil Code, Sec. 330.1. The Commission since then has been in uninterrupted possession of the stock and documentary title. Since the Maritime Commission is exclusively an agency of the United States (Section 201 (a) of the Merchant Marine Act, 49 Stat. 1985, 46 U. S. C. 1111 (a)), its possession of, and documentary title to the stock are obviously that of the United States.

Although respondents have not even remotely suggested that petitioners have any individual interest in the stock involved or that they claim any individual title thereto or right of possession thereof, respondents are suing petitioners as private individuals for the return of the stock, alleging that the "transfer was in fact and in legal effect collateral security for the indebtedness" of Dollar of Delaware to the Maritime Commission (R. 6)[15] and that since such indebtedness has been extinguished, they are entitled to the return of the stock.

[15] Respondents have apparently dropped their claim that the contract was unauthorized and prohibited by the express

In considering the question of whether this is, in effect, a suit against the United States to which it has not consented, we are aware that it is not "an easy matter to reconcile all the decisions of the court in this class of cases". *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446, 451; *Brooks* v. *Dewar*, 313 U. S. 354, 359. We believe, however, that no such reconciliation is here required since, in our view, it is clearly established that this is a suit against the United States by those authorities culminating in the recent decision of this Court in *Mine Safety Appliances Co.* v. *Forrestal*, 326 U. S. 371, and that *United States* v. *Lee*, 106 U. S. 196, relied on by respondents, is not applicable. We submit that this is true regardless of whether the jurisdictional question is considered in light of the complaint alone or the complaint together with petitioners' affidavits.

Before discussing the jurisdictional question itself, the matter of approach to that question should be mentioned. The lower court adopted the theory that the jurisdictional and substantive questions

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provisions of the Merchant Marine Act of 1936, as amended, and that the contract being unenforceable, no legal rights of either party could be effected under said contracts (R. 6). They now take the position that the Maritime Commission was authorized to take title only for the limited purpose of collateral security on a pledge (R. 121), or, alternatively, that since it is doubtful whether Section 207 of the Merchant Marine Act authorizes the Commission to take title for any broader purposes, the contract should be construed not to go beyond that point and, in this way, avoid the necessity of passing on the question of invalidity (R. 121, Br. in Opp. pp. 9–10).

are so interwoven that it is necessary to determine the merits in order to resolve the jurisdictional issue. But in the most recent decision of this Court on that question, the jurisdictional and substantive issues were treated as being distinct, the Court holding that even if a government officer's justification for withholding property was an unconstitutional statute, a suit brought to prevent such withholding was nevertheless one against the United States. *Mine Safety Appliances Company* v. *Forrestal*, 326 U. S. 371, 374–375. As we shall show, the situation here is indistinguishable.

A. *The complaint together with the affidavits show that the present case is an attempt to try title to stock, to which the United States claims absolute title.*—Petitioner's affidavits present uncontroverted factual materials designed to show that the transfer of title to the stock to the Maritime Commission was intended by the parties to the contract to be absolute (see *supra*, pp. 5–9, 10), and to refute respondents' conclusion that "such transfer was in fact and in legal effect collateral security"[61] (R. 6). But the respondents counter with the suggestion, contrary to petitioner's position (R. 104–106) that under Section 207 of the Merchant Marine Act of 1936, as amended, *supra*, pp. 4–5, the Commission

[61] On motion to dismiss, such allegations, being conclusions of law would, of course, not be admitted as true. *Newport News Co.* v. *Schauffler*, 303 U. S. 54, 57; *Pacific States Box & Basket Co.* v. *White*, 296 U. S. 176, 184–185; *Neirbo* v. *United States*, 294 U. S. 317, 324–325, and cases there cited.

was authorized to take title only as collateral security (R. 121).[17] On the complaint and affidavits, then, the crucial questions in this case are the proper construction of Section 207 and the proper interpretation of the contract pursuant to which the title to the stock here involved was transferred to the United States, that is, whether such transfer could be and was absolute or only a pledge.

In view of the facts that the United States took title to the stock lawfully, now has possession thereof, has at least documentary legal title thereto, and claims an absolute title, respondents' attempt to obtain a judicial solution of these questions would appear to be nothing more than a bald effort to try the sovereign's title and clearly to require the presence of the United States. *Louisiana* v. *Garfield*, 211 U. S. 70, 77; *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446; *Oregon* v. *Hitchcock*,

[17] Although authority to acquire absolute title to the stock is not conferred on the Commission in specific language, such authority is encompassed in the over-all provisions contained in Section 207 empowering the Commission to enter into such contracts as may be necessary to carry on its activities. The purposes of the Merchant Marine Act, as stated in Section 101 (*supra*, pp. 3–4) are to foster the development and maintenance of a merchant marine sufficient to carry water-borne commerce of the United States and to provide shipping service on all routes essential for maintaining the flow of such commerce. Thus when Section 207 is construed in light of these purposes, the Commission has authority to acquire absolute title to stock, where, as in the present situation, such acquisition was the only way to avert the bankruptcy of an essential shipping company and to continue it in operation. Cf. *United States ex rel TVA* v. *Welch*, 327 U. S. 546, 551.

202 U. S. 60; *Naganab* v. *Hitchcock*, 202 U. S. 473; *Minnesota* v. *Hitchcock*, 185 U. S. 373; *Louisiana* v. *Jumel*, 107 U. S. 711; *Stanley* v. *Schwalby*, 162 U. S. 255; *United States ex rel. Goldberg* v. *Daniels*, 231 U. S. 218; *Morrison* v. *Work*, 266 U. S. 481; *United States ex rel. Shoshone Irrigation District* v. *Ickes*, 70 F. 2d 771, certiorari denied, 293 U. S. 571. Further, although the suit was ostensibly brought against petitioners as individuals and not as officials of the Maritime Commission, and neither the Maritime Commission nor the United States has been named as a party, petitioners have no individual interest in the stock involved and claim no individual title or right to possession to the stock; the entire impact of the decree would be solely, and directly, upon the interest, possession, and title of the United States. Hence, the United States is the real party in interest, and the suit is not maintainable without its statutory consent. *Mine Safety Appliances Co.* v. *Forrestal*, 326 U. S. 371; *Belknap* v. *Schild*, 161 U. S. 10; *Oregon* v. *Hitchcock, supra; Naganab* v. *Hitchcock, supra; Morrison* v. *Work, supra; United States ex rel. Goldberg* v. *Daniels, supra.*

In *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446, a railroad company failed to pay interest upon bonds which the State of Georgia, taking a property lien as security, had endorsed, and at the receiver's sale, the State bought in the property. While the State was in possession of the

property, the holders of a subsequent issue of mortgage bonds issued by the company filed a bill in equity, joining state officers as defendants, to foreclose plaintiff's mortgage and to set aside the sale to the State on the grounds that the State had no constitutional power to make the purchase and that its officers, therefore, were not authorized to bid for the property or to remain in possession thereof. The Court affirmed a decree dismissing the bill for want of jurisdiction, and said (109 U. S. at 457):

> In the case now under consideration the State of Georgia is an indispensable party. It is in fact the only proper defendant in the case. No one sued has any personal interest in the matter or any official authority to grant the relief asked.
>
> No foreclosure suit can be sustained without the State, because she has the legal title to the property, and the purchaser under a foreclosure decree would get no title in the absence of the State. The State is in the actual possession of the property, and the court can deliver no possession to the purchaser. The entire interest adverse to the plaintiff in this suit is the interest of the State of Georgia in the property, of which she has both the title and possession.

Similarly, in *Oregon* v. *Hitchcock*, 202 U. S. 60, a suit was brought by the State of Oregon against the Secretary of the Interior and the Commissioner of the General Land Office to enjoin them from patenting to Indians lands within that State, title

to which was claimed by the United States but also claimed by the plaintiff State under certain acts of Congress. The Court, in dismissing the complaint for lack of jurisdiction, followed the rule enunciated in *Minnesota* v. *Hitchcock*, 185 U. S. 373, 387 (202 U. S. at 69):

> Now, the legal title to these lands is in the United States. The officers named as defendants have no interest in the lands or the proceeds thereof. The United States is proposing to sell them. This suit seeks to restrain the United States from such sale, to divest the Government of its title and vest it in the State. The United States is, therefore, the real party affected by the judgment and against which in fact it will operate, and the officers have no pecuniary interest in the matter. If whether a suit is one against a State is to be determined, not by the fact of the party named as defendant on the record, but by the result of the judgment or decree which may be entered, the same rule must apply to the United States. The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record but by the question of the effect of the judgment or decree which can be entered.

Respondents claim that the principles established by the cases above cited are inapplicable. They argue that this is an action *ex delicto* against individual officers of the United States to restrain an unauthorized invasion of respondents' property,

and that "their title antedated the contract, the contract of pledge has served its purpose, has been exhausted and is *functus officio*." (Br. in Opp. p. 13).

But the fact that respondents had title prior to the execution of the contracts is completely irrelevant. The situation at the time the present proceeding was instituted and the one which still prevails is that under the contract here in question, respondents transferred whatever title to the stock they had to the United States which, having at least documentary legal title, claims the right in itself under the contract here involved to retain it. Respondents do not now have either title or possession and the avowed purpose of the present proceeding is to procure the return to respondents of the title and possession with which they have parted.

The contention that this is an action *ex delicto* is likewise inapposite. Similar contentions have been urged upon the courts in practically all the cases referred to above but have never been accepted with respect to suits like this which seek to control the disposition, or to obtain an adjudication as to the ownership, of property claimed by the sovereign and in its possession. *Cunningham* v. *Macon & Brunswick R. R. Co., supra; Morrison* v. *Work; supra; Naganab* v. *Hitchcock; supra; Oregon* v. *Hitchcock, supra; Stanley* v. *Schwalby, supra; United States ex rel. Goldberg* v. *Daniels, supra; Mine Safety Appliances Co.* v. *Forrestal, supra.*

Respondents' position merely begs the question. This is not a case where respondents were the owners in possession of property which petitioners invaded without color of authority. On the contrary, respondents admit that the United States lawfully acquired possession of, and documentary title to, the stock. Respondents can prevail only by obtaining a decree holding that the United States has no title. The question whether the stock should be returned to respondents, is one on which the United States must be heard and, as to which it is the real party in interest.

Accordingly, when the complaint is viewed with the affidavits, it is clear that since the real issue on the merits is related to the title to the stock which the United States holds and claims absolute title to, a court has no jurisdiction to determine that question raised in the absence of the United States. "In short, the government's liability cannot be tried 'behind its back.' *Louisiana* v. *Garfield*, 211 U. S. 70, 78." *Mine Safety Appliances Co.* v. *Forrestal*, *supra*.

B. *The complaint on its face discloses that respondents seek specific performance of a contract with the United States.*—Disregarding the facts established by the affidavits and looking solely to the complaint, it is nevertheless apparent that the present proceeding is a suit against the United States. The complaint alleges that pursuant to contract, the stock here involved was transferred to

the United States as collateral security for a debt now extinguished; that it is held by agents of the United States under a claim of absolute ownership by the United States; and that respondents made demand upon the Maritime Commission for the return of the stock, which request was denied (R. 6–7). The complaint then prays that petitioners be enjoined from selling the stock and that they be ordered "to return the plaintiffs' stock now in the unlawful possession and custody of the defendants, to the plaintiffs, the lawful owners" (R. 8).[18] Respondents, in praying for such relief, are only nominally proceeding against petitioners; actually, they are seeking by indirection to obtain specific performance of the contract against the United States.

That this proceeding is only nominally directed against petitioners as private individuals can be

[18] Respondents refer to the Federal Tort Claims Act (Act of August 2, 1946, Public Law 601, 79th Cong., 2d Sess., Title IV, Sec. 401 et seq.) (Br. in Opp., pp. 15–16, 22) as waiving the sovereign immunity of the United States in regard to certain torts of its employees. Aside from the fact that it is doubtful that the Act covers acts of the character here alleged, it authorizes only money judgments and not the affirmative relief here requested by respondents. Section 410. Moreover, the alleged claim here involved arose before January 1, 1945, the initial accrual date set by the Act. Section 410. In any case, this Act would be pertinent only in a suit against the United States and in no way affect suits against Government officers as individuals. If respondents were seeking a money judgment, recovery would be available in the Court of Claims on a suit against the United States if the contract had in fact been breached. Section 145 of the Judicial Code, 28 U. S. C. 250.

conclusively shown by the fact that the relief sought cannot be obtained through any judgment against Admiral Land and the other petitioners who are no longer connected with the Commission.[19] Admiral Land's sole activities in regard to the stock—the taking of possession and title,[20] the custody and refusal to return to respondents—has been in his official capacity as member of the Commission. Admiral Land is not now in a position either actually to sell the stock himself, or to prevent any officials on the Commission from so disposing of the stock, nor is he able either himself to return the stock or order its return to respondents. Thus any judgment against Admiral Land would be ineffective to secure the relief sought by respondents. Petitioner McKeough is the only one of the originally named defendants who still is a member of the Commission and even he would be unable to comply with such a court order, since the Commission can act only through a majority of its members. Section 201 (a) of the Merchant Marine Act. True, Mr. Mc-

[19] Of the five original defendants, only one—Raymond S. McKeough—is at this time still a member of the Maritime Commission. Admiral Land and Mr. Macauley have resigned. Mr. Carmody's term as member of the Commission expired on September 26, 1946, and Admiral Vickery has died. The discussion, couched in terms of Admiral Land for convenience only, applies to the others as well.

[20] Admiral Land was the only one of the members of the Maritime Commission named as defendants in the present case who held a position within the Commission at the time of this transaction (R. 21-22).

Keough, together with the petitioners who have been added (see *supra*, note 1, p. 1) would be in a position to comply with the order, but that would be only because of their official positions in the Maritime Commission. Any action aimed at giving respondents the requested relief would thus necessarily involve the exercise by these petitioners of the official authority of their position. Hence the suit can be effective only to the extent that it seeks to control petitioners' actions and functions as members of the Maritime Commission.

It is settled law that any action seeking relief against an officer of the sovereign, which relief can be afforded only by such officer acting in his official capacity, is a suit against the sovereign. *Belknap* v. *Schild*, 161 U. S. 10, 25; *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292, 296; *Hagood* v. *Southern*, 117 U. S. 52, 69; *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446, 457. Moreover, inasmuch as respondents are seeking return of stock the possession of which the United States lawfully acquired, the United States is "the only real party against which alone in fact the relief is asked and against which the judgment or decree effectively operates." *In re Ayers*, 123 U. S. 443, 506; *Belknap* v. *Schild*, 161 U. S. 10, 25; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 387. Since the return of stock is allegedly due respondents in accordance with the terms of the contract, the present proceeding is in effect a forbidden suit for specific performance of

a contract with the United States. *Wells* v. *Roper*, 246 U. S. 335; *Belknap* v. *Schild*, 161 U. S. 10, 19; *Hagood* v. *Southern*, 117 U. S. 52; *Louisiana* v. *Jumel*, 107 U. S. 711; *United States ex rel. Goldberg* v. *Daniels*, 231 U. S. 218; *Boeing Air Transport* v. *Farley*, 75 F. 2d 765 (App. D. C.); certiorari denied *sub nom. Pacific Air Transport* v. *Farley*, 294 U. S. 728; *Transcontinental & Western Air, Inc.* v. *Farley*, 71 F. 2d 288 (C. C. A. 2), certiorari denied, 293 U. S. 603; *United States ex rel. Shoshone Irr. Dist.* v. *Ickes*, 70 F. 2d 771 (App. D. C.), certiorari denied, 293 U. S. 571.

The instant case is no different from the cases where an attempt is made to reach money in the possession of the Government. In those cases this Court has held that the sovereign is the "real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Ford Co.* v. *Department of Treasury*, 323 U. S. 459, 464; *Kennecott Copper Corp.* v. *State Tax Commission*, 327 U. S. 573; see also *Smith* v. *Reeves*, 178 U. S. 436; *Great Northern Ins. Co.* v. *Reed*, 322 U. S. 47; *Lankford* v. *Platte Iron Works*, 235 U. S. 461.

C. United States *v. Lee, relied on by respondents, is inapplicable.*—Respondents have contended (Br. in Opp., pp. 14–15) that the instant case is governed by *United States* v. *Lee*, 106 U. S. 196.[n] That was

[n] The other cases relied on by respondents such as *Tindal* v. *Wesley*, 167 U. S. 204, and *Correa* v. *Barbour*, 71 F. 2d 9 (C. C. A. 1), are in all respects comparable to the *Lee* case and were decided solely upon its authority. They, therefore,

an action in ejectment against officers of the United States as individuals to evict them from possession of plaintiff's lands which they had taken under the color of an invalid tax title held by the United States. In those circumstances, the Court held that the action could be maintained against these officers as individuals without joining the United States. That case, we submit, is inapplicable for at least two reasons.

1. In the *Lee* case, the Court found that the property was taken from plaintiff "by force and violence" (106 U. S. at 219), and without pretense of authority (106 U. S. at 219–222); the facts further disclosed that plaintiff's property had been confiscated, since the claim of title of the United States depended on an unauthorized tax sale following the refusal of the Governments' officers to permit plaintiff to pay taxes after they became due. Therefore, the original taking by defendants was a trespass which had continued throughout their possession and there manifestly was not even a colorable basis for the claim of the United States. That was one of the cases which "hold that a public officer cannot

require no separate discussion. *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, and *Ickes* v. *Fox*, 300 U. S. 82, are cited by respondents (Br. in Opp., p. 15) for the same proposition. The proposition for which they actually stand—that an obviously illegal interference on the part of a Government official, with land in the plaintiff's possession, may be enjoined in a suit against the official in his private capacity—neither has, nor is alleged to have, any application to the facts in this case.

justify a trespass against a person's property by invoking the command of an unconstitutional statute. Under such circumstances, the tort becomes the officer's individual responsibility, and the government is not held to have sufficient interest in the controversy to be considered an indispensable party." *Mine Safety Appliances Co.* v. *Forrestal, supra,* at 374. In the instant case, however, petitioner Land is the sole defendant who was a member of the Commission when the stock was originally acquired in 1938 (R. 21-22), and hence if any trespass had occurred at the initial taking, the petitioners here, other than petitioner Land, not having committed it, would, of course, not be liable therefor. Moreover, it is clear that the original taking was not a trespass since it is conceded that the original acquisition of title to the stock by the United States was valid, regardless of the scope of the title then taken, and that the United States rightfully continued in possession at least until 1943. Its continued possession thereafter can hardly be characterized as a "trespass" within the limits of the *Lee* case.

2. Moreover, in the *Lee* case, the action was ejectment, an action which traditionally does not raise or dispute the issue of ownership or title. See Adams, *Ejectment,* p. 351; Freeman, *Judgments* (5th ed., 1925), Sec. 860; 3 Blackstone, *Commentaries,* pp. 200–207. The Court in that case carefully emphasized that the suit was for possession

only (106 U. S. at 210, 219) and that the interest of the United States in the title would in no way be bound or affected by the decree (106 U. S. 217, 222). Thus there was not involved, as there is here, any claim of title as against the United States, and a decree granting the plaintiff possession—the relief which it sought—could be, and was, entered without disturbing or adjudicating the claim of ownership of the United States. Here, possession and title are for all practical purposes inseparable; delivery of possession of the stock, when endorsed in blank as in the case of the original delivery to the United States, would transfer title to respondents. Uniform Stock Transfer Law, Section 1. If not so endorsed, the stock would be of no use to respondents.

The limited applicability of the *Lee* case has consistently been recognized by this Court. See opinion of Mr. Justice Miller, who had written the majority opinion in the *Lee* case in *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446, 452. See also *Stanley* v. *Schwalby*, 147 U. S. 508, 518–519. On the second hearing of *Stanley* v. *Schwalby*, 162 U. S. 255, 271–272, this Court approved the *Lee* case on the ground that the action of ejectment under Virginia law there involved did not try title; it held that where, as in Texas, an action of trespass to try title put in issue the title claimed by the United States, the United States was an indispensable party. Similar considerations make the *Lee* case totally inapplicable here.

D. *The United States Maritime Commission, an agency of the United States, is not subject to suit.*—As "another facet of the jurisdictional question which buttresses our conclusion to reject the defendant's claim of immunity at this time" (R. 168), the lower court found a waiver of sovereign immunity from the authority vested in the Maritime Commission by Section 207 of the Merchant Marine Act of 1936, as amended (*supra*, pp. 4–5) to perform certain functions "in the same manner that a private corporation may contract." It is not clear whether this finding was intended merely to support the lower court's previous adoption of respondents' theory that the present proceeding was *ex delicto* against the members of the Maritime Commission as individuals, or to provide an independent alternative ground for jurisdiction in the district court.

If intended merely to support the court's earlier conclusion, that this was a suit against private individuals, such a finding is obviously irrelevant, since in the absence of an attempt to sue the Maritime Commission, it is immaterial whether that Commission is suable. On the other hand, if this finding is intended as an alternative holding, the lower court, in order to give content to such holding, must also hold that the present proceeding is, in effect, a suit against the Maritime Commission. Such a holding would be irreconcilable with respondents' theory that this is a suit against private individuals—a factor which has led respondents to

characterize this portion of the opinion of the court below as "reflections" (Br. in Opp., p. 22).

In any event, the finding of a waiver of immunity is improper. The Maritime Commission is an agency of the United States, and as such is, of course, immune from suits in the absence of a waiver. There has been no express waiver of sovereign immunity of the Maritime Commission except in certain instances not here relevant, arising under Section 2 of the Suits in Admiralty Act (41 Stat. 525, 46 U. S. C. 742).

Nor may a waiver properly be implied. Every authorized activity of the United States is an exercise of governmental power (*Pittman* v. *Home Owners' Loan Corp.*, 308 U. S. 21; *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U. S. 95), and, except where Congress has waived it, federal immunity is coextensive with the entire scope of federal powers. The broad authority to contract, granted the Commission by Section 207, was deemed necessary in view of the complex business transactions contemplated for that agency by the Act which created it. To read into the provisions of Section 207 a waiver of immunity disregards a long line of decisions of this Court which prohibit such relinquishment of a sovereign immunity by implication. *United States* v. *Sherwood*, 312 U. S. 584, 590; *United States* v. *Michel*, 282 U. S. 656; *Price* v. *United States*, 174 U. S. 373; *Shillinger* v. *United States*, 155 U. S. 163; cf. *United States* v. *Shaw*,

309 U. S. 495; *United States* v. *United States Fidelity Co.*, 309 U. S. 506.

CONCLUSION

For the reasons stated, it is respectively submitted that the judgment below is erroneous and should be reversed.

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